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Order on Motions for Summary Judgment (MEADOW SPRINGS, LLC)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MEADOW SPRINGS, LLC, Plaintiff, v. IH RIVERDALE, LLC and GEOFFREY NOLAN, Defendants and Third-Party Plaintiffs, v. McCHESNEY CAPITAL PARTNERS, LLC, GEORGE McCHESNEY and NICK WALLDORFF Third-Party Defendants.	)	Civil Action No.: 2007CV143869

FILED IN OFFICE
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DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On December 20, 2007, counsel appeared before the Court to present oral arguments on cross motions for summary judgment. After reviewing the record of the case, the briefs submitted on the motions, and the arguments presented by counsel, the Court finds as follows:

I. FACTS

This case was originally filed in Fulton County State Court and was transferred on November 13, 2007, by an order of State Court Judge Susan B. Forsling. The case was then assigned to Judge Elizabeth Long in the Fulton County Superior Court Business Case Division because it is related to several other cases before Judge Long.

IH Riverdale, LLC ("IH") and Geoffrey Nolan, Defendants in this case, filed a complaint and a lis pendens in August, 2003, in a related case, IH Riverdale, LLC and

Geoffry Nolan v. McChesney Capital Partners, LLC, et al., *civil action number* 2003CV73603 (the "Main Case"). In response, Meadow Springs, LLC, ("Meadow Springs") filed this lawsuit alleging slander of title and tortuous interference and seeking damages related thereto.

In January, 2001, McChesney Capital Partners, LLC ("MCP"), entered into an agreement to purchase (the "Purchase Agreement") a tract of land for development ("Phase I") from G&I Development Company, LLC ("G&I"). The Purchase Agreement also stated that at closing G&I would grant MCP an option (the "Option") to purchase an additional adjacent tract of land (the "Phase II" property). On April 19, 2001, MCP assigned 50% of its interests in the Purchase Agreement to "Nolan or IH Riverdale, LLC" (the "Assignment"), including the Option. The terms of IH/Nolan's interests in the Option were to be defined in an operating agreement to be entered into at a later time.

Riverdale Capital Investments, LLC ("RCI") was created to acquire and develop Phase I. In order for the Phase I property to be acquired in accordance with IRS § 1031 tax-deferred exchange regulations, MCP transferred its right to purchase Phase I to Qualified Exchange Accommodations LLC, who acted as an intermediary in the transaction, and directed that the property be conveyed to RCI.[1] On June 13, 2001, RCI closed the Purchase Agreement with G&I and developed Phase I. Pursuant to the Purchase Agreement, after the Phase I closing, G&I and MCP executed an option agreement for Phase II. The terms of IH/Nolan's participation in the Option were defined in RCI's Amended Operating Agreement, granting IH/Nolan, among other things, a right of first refusal (the "Right of First Refusal") to invest in the Option.

[1] Jeb Beardsley, an attorney, advised MCP on the structure of this transaction and the other § 1031 transfers involved here.

In 2003, Meadow Springs was created to acquire and develop Phase II. After an assignment from MCP, Meadow Springs exercised the Option through a §1031 tax-deferred exchange.[2] On April 4, 2003, Meadow Springs closed the Phase II property and began development.

In order to finance construction, Meadow Springs obtained a short-term $1.5 million loan from Michael McChesney (the "McChesney Loan") while it sought long-term financing. In August, 2003, Meadow Springs was in the process of closing a multi-million dollar construction loan from Regions Bank, when IH and Nolan filed the complaint and lis pendens in the Main Case. IH/Nolan claimed that they were prevented from exercising their Right of First Refusal to participate in the Option and filed suit in the Main Case to enforce their rights. The following day a copy of the complaint and the lis pendens was delivered to Regions Bank.

The Regions Bank loan did not close and Meadow Springs subsequently defaulted on the McChesney Loan. Thereafter, Michael McChesney foreclosed on the Phase II property and purchased it through foreclosure proceedings.

As a result of the lis pendens in the Main Case, and the title objection it created, Meadow Springs brought this action against IH and Nolan alleging slander of title and tortuous interference.

II. SUMMARY JUDGMENT

To prevail on a motion for summary judgment, the moving party must demonstrate that "there is no genuine issue of material facts, viewed in the light most favorable" to the non-moving party, "to warrant judgment as a matter of law." Lau's

[2] Again, MCP's attorney structured the transfer, and at the time was president of Meadow Springs.

Corp. v. Haskins, 261 Ga. 491 (1991). See also, Danforth v. Bullman, 276 Ga. 531, 532 (2005).

When Defendants filed their complaint in the Main Case they also filed a lis pendens in accordance with O.C.G.A. §§ 23-1-18 and 44-14-610. The purpose of a lis pendens is to put potential purchasers and persons who are not parties to a pending suit on notice that a lawsuit involving the realty has been filed. Aiken v. Citizens & S. Bank, 249 Ga. 481 (1982).

In order for a lis pendens to be valid, the real property in question must be "involved" in the lawsuit. Colony Bank Southeast v. Brown, 275 Ga. App. 807 (2005); see also, Jay Jenkins Co. v. Financial Planning Dynamics Inc., 256 Ga. 39 (1986). Plaintiff argues that, under Georgia law, an unvested (e.g., unexercised or insufficiently exercised) option holds no legal or equitable interest in the real property. General Electric Co. v. Lowe's Home Centers, Inc., 279 Ga. 77, 79 (2005); Martin v. Schindley, 264 Ga. 142 (1994). The Right of First Refusal of the Option was not exercised by IH/Nolan. Plaintiff, therefore, contends that the Main Case does not "involve" real property within the meaning of the lis pendens statute, that the lis pendens should not have been filed, and that in doing so Defendants caused it harm. Plaintiff also argues that IH/Nolan's claims to impose a constructive trust on Phase II is neither a proper basis for filing a lis pendens, nor an appropriate remedy since Defendants had no title to or interest in the property. The claim for specific performance of the Option must fail because IH/Nolan never exercised the Option, or never tendered the purchase price.

In Colony Bank, the Court of Appeals upheld a trial court's refusal to cancel a lis pendens on property for which a party sought the equitable relief to restore the land to its

original condition and to install appropriate water flow measures. Title to the property was not involved. Colony Bank, 275 Ga. App. at 808. The Supreme Court found in Scroggins v. Edmundson, 250 Ga. 430 (1982), that a lis pendens was proper since, if the plaintiff ultimately prevails, a trust or lien will imposed on the property. Id. at 433.

Whether or not IH/Nolan was prevented from exercising the Right of First Refusal of the Option or whether it failed to timely exercise it, are questions that remain unresolved in the Main Case.[3] This Court cannot preclude IH/Nolan from protecting its potential interests in Phase II simply because their rights with regard to the property have not yet been determined. IH/Nolan filed suit to enforce their alleged rights in the Phase II interests and simultaneously filed a lis pendens to protect the potential interest "involved" in the property. The Court finds the filing of the lis pendens to be appropriate.

The allegations and averments contained in pleadings filed in a court case are absolutely privileged. O.C.G.A. § 51-5-8. Thus, the statements in the complaint and the lis pendens in the Main Case are privileged under this statute, and cannot give rise to slander of title or tortious interference, unless IH/Nolan's sending of the documents to Regions Bank exceeded the boundaries of the privilege. See, Panfel v. Boyd, 187 Ga. App. 639 (1988).

In O'Neal v. Home Town Bank, 237 Ga. App. 325 (1999), the Court of Appeals refused to apply the absolute privilege to a letter sent to a bank's 900 shareholders containing quotations from a verified pleading. The Court held that the letter itself was not a pleading, and thus could only qualify for the conditional privilege found in O.C.G.A. § 55-5-7. Id. at 331-332.

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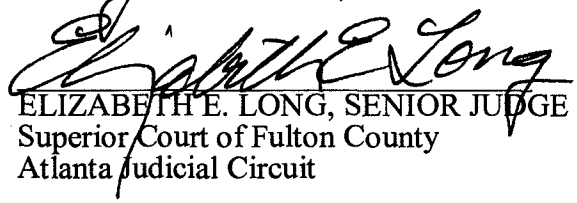
[3] In IH Riverdale, LLC v. McCheney Capital Partners, LLC, 280 Ga. App. 9 (2006), the Court of Appeals reversed, in part, the trial court's grant of summary judgment to MCP and reserved questions of IH/Nolan's Option for a jury.

Here, unlike O'Neal, rather than quoting portions of the pleadings, the actual documents were enclosed. The purpose of a lis pendens is to put third parties on notice of a lawsuit. It would seem nonsensical to attach liability for publication of the very notice that the lis pendens statute establishes. This Court finds that this publication does not exceed the boundaries of the absolute privilege established in O.C.G.A. § 51-5-8.

Summary Judgment is **GRANTED** to Defendants. This ruling necessitates the **DENIAL** of Plaintiff's Motion for Partial Summary Judgment.

SO ORDERED this 15th day of January, 2008.



ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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